

Abdule (Migration) [2023] AATA 145 (18 January 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Selamo Ahmed Abdule
VISA APPLICANT:	Mr Bedaso Abdella Mume
REPRESENTATIVE:	Mr Asad Rana
CASE NUMBER:	1902025
DIBP REFERENCE(S):	BCC2017/2316852
MEMBER:	Naomi Schmitz
DATE:	18 January 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211(2) of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 18 January 2023 at 1:35pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine and continuing relationship – child born of the relationship – DNA testing – evidence of regular communications – money transfers – sponsor’s visits to Ethiopia – political and civil circumstances of Ethiopia – best interest of the child principles – decision under review remitted

LEGISLATION

Marriage Act 1961, ss 23B, 88E

Migration Act 1958, ss 5, 12, 65, 360

Migration Regulations 1994, Schedule 2, cls 309.211, 309.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 27 November 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 27 June 2017 on the basis of his relationship with his sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. Whilst the delegate accepted that the parties were legally married, the delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl.309.221 because the delegate was not satisfied that the applicant was the spouse of the review applicant, as defined in s.5F of the Act. In particular, the delegate was not satisfied that there was sufficient evidence to support the financial nature of the parties' relationship, the nature of their household, the social aspects of their relationship and the nature of the parties' commitment to each other.
4. The delegate who considered the application noted the following issues:
 - The evidence supplied by the applicant was insufficient to show that the parties were pooling their financial resources or sharing day-to-day household expenses. In particular, there were limited financial transfers and none which pre-dated the time of visa application;
 - The visa applicant presented insufficient evidence of cohabitation during the sponsor's claimed time (four months) in Ethiopia and evidence of the parties' general domestic living arrangements. The delegate noted there was minimal photographic evidence and what evidence that was presented was of limited probative value;
 - The parties provided insufficient evidence that they presented themselves to family and friends as being in a committed relationship or were regarded by people as such. Limited photographs were presented and those that were provided did not show the parties at various settings. The statutory declarations submitted also did not sufficiently detail the development of the relationship between the parties; and
 - The parties submitted insufficient evidence to support the parties' current claimed relationship and commitment to each other. The chat/call records and evidence at interview did not provide substantive detail and overall the delegate was not satisfied that the parties presented themselves in a genuine and ongoing relationship.
5. Taking these matters into account, the delegate was not satisfied the parties were in a genuine and continuing relationship. The delegate found that the visa applicant was not the spouse, as defined in section 5F of the Act, of the sponsoring partner and therefore did not meet the criteria in cl.309.211(2) and cl.309.221(1) and refused the application.
6. *Background*
7. The visa applicant is a citizen of Ethiopia and is currently 32 years of age. His family continues to reside in Ethiopia. The review applicant is a permanent resident of Australia. She was born in Ethiopia and is currently aged 27 years.

8. The parties claim that they first met in 2012 as a result of the review applicant attending the same school as the visa applicant's sibling. They began a romantic relationship in May 2012. They subsequently became engaged in 2012 and married on 2 January 2015 in Ethiopia¹ and resided with one another for approximately four months before the review applicant returned to Australia.
9. Information submitted to the Tribunal shows the review applicant first arrived in Australia on 20 May 2015. She subsequently travelled overseas on 10 June 2016 and returned to Australia on 1 August 2018. During this time she visited the applicant in Ethiopia.² The parties claim during this time that the review applicant conceived a child and that they were in a genuine and continuing spousal relationship. In April 2019, the review applicant gave birth to a baby girl, Sefan.³ Sefan is currently three years and nine months of age.
10. On 5 August 2022, the Tribunal invited the applicant under s.360(1) of the Act to appear at a Tribunal hearing commencing at 9:30am (VIC time) on 22 August 2022 to give evidence and present arguments relating to the issues arising in relation to the decision under review. The Tribunal was required to do this because it had considered the information it had and was unable to make a decision favourable to the applicant.
11. On 8 August 2022, the Tribunal invited the visa applicant to undertake a DNA test to establish the paternity of Sefan. The Tribunal also invited the review applicant to provide DNA evidence confirming she was not related to the visa applicant. The parties consented to undertaking a DNA test.
12. On 17 August 2022, the Tribunal wrote to the review applicant and advised that the Tribunal Member had decided to postpone the hearing scheduled on 22 August 2022, to allow time for further information to be provided, namely the results of the DNA testing.
13. On 3 October 2022, the Tribunal received DNA paternity test results which showed that the visa applicant was 99.99999999% more likely than not to be the father of the review applicant's child born in April 2019.⁴ The DNA tests also showed that the visa applicant and review applicant were unlikely to be full biological siblings, with a 0.0015 to 1 ratio.⁵
14. On 17 October 2022, the Tribunal wrote to the review applicant and advised that given the DNA paternity results, the Tribunal Member did not propose to conduct a hearing and requested that the representative provide the Tribunal with written submissions and any other supporting information as to why the visa applicant both at the time of application and time of decision satisfies cl.309 of Schedule 2 of the Regulations. The Tribunal requested the information by 4:00pm on 31 October 2022.
15. On 31 October 2022, the Tribunal received submissions and various evidence in support. This included the following:
 - Evidence of financial transfers sent from the review applicant to the visa applicant;
 - A marriage certificate;
 - The birth certificate of Sefan;

¹ Marriage certificate (certified/translated dated 6 March 2017)

² Flight itinerary provided by representative and Departmental file and Tribunal file

³ Certified birth certificate dated 4 June 2019

⁴ DNA Solutions Paternity Report dated 3 October 2022. The visa applicant is 10 billion times more likely to produce a child with the required alleles than a man drawn randomly from the African population

⁵ DNA Solutions Kinship Testing Report dated 3 October 2022

- 10 statutory declarations from various family members and friends attesting to the genuine and continuing nature of the parties' relationship;
- A letter of support from MiCare who have provided support to the review applicant and Sefan;
- Flight tickets/travel itinerary relating to 2018 travel to Ethiopia;
- Screenshots of Facetime and WhatsApp chat history communications between the visa applicant and review applicant; and
- Various photographic evidence.

16. The Tribunal Member considered the representative's submissions and evidence filed in support and was able to make a favourable decision on the papers without proceeding to re-listing the matter for hearing, pursuant to s.360(2)(a) of the Act.
17. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

18. The issue in the present case is whether the visa applicant is the spouse as defined in s.5F of the Act of the review applicant.

Whether the parties are in a spouse or de facto relationship

19. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is a permanent resident.
20. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

21. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).⁶ The Tribunal is also satisfied that the parties are not siblings⁷ therefore satisfying s. 5F(2)(a).⁸

⁶ Ibid. Marriage certificate

⁷ Ibid. DNA Kinship Testing Report

⁸Section 12 of the *Migration Act* sets out for the purpose of deciding whether a marriage is to be recognised as valid, Part VA of the *Marriage Act* 1961 applies as if s.88E of the *Marriage Act* 1961 were omitted. A marriage will not be recognised in Australia (or not valid) if the parties are in a

Are the other requirements for a spouse relationship met?

22. *Financial aspects*

23. The visa applicant is currently residing in Ethiopia and works as a driver. The review applicant and Sefan are currently residing in rental accommodation in Meadow Heights, Victoria. The visa applicant and review applicant do not have any joint assets or liabilities due to living in separate countries.
24. The review applicant was originally a student. The review applicant is currently unemployed due to being a full-time carer for Sefan. The review applicant is currently in receipt of government Centrelink benefits which she relies upon to meet her daily living expenses such as rent, utility bills and clothing. She also receives support from MiCare, a support agency who provides settlement support to refugees and migrants. Due to the review applicant's impecunious circumstances, the review applicant has had limited savings to send the visa applicant.⁹
25. The review applicant has sent the visa applicant money and provided evidence of various money transfers including:
- a. On 18 January 2018 in the sum of AUD\$109.00;
 - b. On 30 January 2018 in the sum of AUD\$74.00;
 - c. On 23 August 2018 in the sum of USD\$101.00;
 - d. On 31 October 2018 in the sum of USD\$98.00;
 - e. On 8 August 2019 in the sum of USD\$101.00;
 - f. On 13 December 2019 in the sum of USD\$95.00;
 - g. On 29 August 2020 in the sum of USD\$132.30;
 - h. On 2 September 2020 in the sum of USD\$431.50;
 - i. On 5 November 2020 in the sum of USD\$131.20;
 - j. On 22 December 2020 in the sum of USD\$208.50; and
 - k. On 2 July 2021 in the sum of USD\$101.00.
26. The review applicant also claimed that she had not returned to Ethiopia due to her limited financial capacity, the security situation in Ethiopia, the COVID-19 pandemic and difficulties travelling with a young child. The review applicant claimed that the political and civil circumstances of Ethiopia presented significant safety concerns for her and her child Sefan. In support the representative provided various printouts from the Australian Smart Traveller website.¹⁰
27. The Tribunal has considered the above funds transfer frequency and amounts which the Tribunal regards as irregular and a paltry sum. However, given the review applicant has suffered and continues to suffer financial hardship, the Tribunal regards that it would be unreasonable to expect a person in the review applicant's position to be able to send large and regular sums of money to the visa applicant. Further, given the parties are geographically separated, the Tribunal would not expect that the parties would have joint assets, joint bank accounts, joint liabilities or entered into any significant legal arrangements

prohibited relationship (see s. 88D of the *Marriage Act*). A prohibited relationship is defined in s.23B of the *Marriage Act* and includes parties who are siblings, s23B(2).

⁹ The Tribunal file shows various banking and financial documents submitted in support of a fee waiver which show the review applicant has limited funds.

¹⁰ Ethiopia Travel Advice Safety Smart Traveller dated 8 September 2021.

such as property purchases or investments together. Nor would it be reasonable to expect that given the parties are living apart, that they would be in a position to pool their limited resources.

28. Accordingly, the Tribunal places some weight on the evidence of some funds being sent to the applicant by the review applicant. As the applicant and sponsor reside in separate countries the Tribunal recognises the difficulty of combining financial affairs, joint ownership of assets and pooling of financial resources and therefore limited weight is given to this factor in the Tribunal's overall consideration of this application. The Tribunal further accepts the review applicant's claims that she has not returned to Ethiopia and has been unable to return due to her financial situation and the safety concerns in Ethiopia.

29. *Household*

30. The parties being apart, could not be expected to have set up a household akin to two persons who live in the same country. The opportunities for being together have been confined to when the sponsor has travelled to Ethiopia. Sefan is yet to meet her father but has maintained communication via video call.
31. The Tribunal has sighted photographs of the sponsor and review applicant's wedding and photographs with family and friends and the Tribunal places some weight on those photographs, however they do little to illustrate to the Tribunal that the sponsor stayed at the home of the applicant in her capacity as his spouse. Nor is there probative evidence in the way that household registration might be, that the community and local officials had registered the sponsor residing at the home of the applicant.
32. However, the Tribunal has had regard to the fact that during the sponsor's time offshore visiting the applicant, that they conceived a child. Recent DNA paternity testing confirms that the applicant is the biological father of Sefan which the Tribunal places significant weight on and corroborates the parties' claims that they were living in a joint household as husband and wife. The Tribunal also accepts the representative's submissions that whilst it is acknowledged there are limited photographs depicting the parties together, that this is largely due to their conservative cultural norms and the parties not taking copious photographs or selfies together. The Tribunal similarly accepts that no recent photographs can be provided due to the sponsor not travelling to Ethiopia and being with one another due to the significant expense associated with international travel and the security concerns in Ethiopia. The Tribunal has had regard to the voluminous phone and social media communications which show the parties in regular contact, including communications between the visa applicant and Sefan. Although a large portion of these communications was regrettably untranslated, considering the overall chats and other circumstantial evidence, the Tribunal is prepared to accept the communications. The Tribunal further understands that the parties intend to reside with one another as a family should the visa application be granted.

33. *Social aspects*

34. Statements have been provided by multiple members of the parties' family, friends and local community who attest to the genuineness of the relationship and the fact that they represent themselves as being in a spousal relationship despite their geographical distance and that their relationship is accepted by the family, friends and local community. This is further supported by the review applicant's travel movement records evidencing her 2018 visit to the applicant. The parties have in the past and plan in the future to continue to engage in social activities as a couple.

35. From the photographic materials submitted it is clear that the parties are seen as a couple by the respective family and local communities and that their relationship is seen as one which is genuine and continuing. This is further corroborated by phone and social media chat communications which show the parties in continuous contact which the Tribunal places significant weight in the visa applicant's favour. The Tribunal has also had regard to the statement from MiCare and the impact of the separation on Sefan from her biological father and the best interests of the child principles.¹¹ Overall, the Tribunal is satisfied that the parties present themselves to family and friends as being in a committed relationship.

36. *Commitment to each other*

37. The parties first met in 2012 in Ethiopia and commenced a relationship and became engaged later that year. They subsequently married in January 2015. The review applicant migrated to Australia in May 2015. The review applicant subsequently returned to Ethiopia in June 2018 to visit the applicant. The Tribunal accepts that this travel was genuine and not for the purpose of enhancing the parties' claims or facilitating a migration outcome. Despite their physical separation, the parties continue to maintain a loving but distant relationship and have had one child after lodgement of application as evidenced by the phone/social media records, statutory declarations, letter from Micare and DNA paternity testing results which the Tribunal places positive weight in the visa applicant's favour. The couple has now been in a romantic relationship for over seven years, including living together for four months whilst the review applicant was visiting overseas. Whilst there may be limited photographic evidence as discussed above, the Tribunal accepts this is heavily based on the parties' cultural norms.

38. The Tribunal accepts that the parties have lived separately and away from each other due to the applicant's visa refusal and the delay in processing their file. The Tribunal further accepts that the sponsor has been unable to travel back to Ethiopia due to financial constraints, the security and safety concerns in Ethiopia and her parental responsibilities for a young child. Accordingly, the Tribunal does not place adverse weight on this.

39. The Tribunal finds that the parties provide each other with the degree of companionship and emotional support which would be expected in a genuine and continuing relationship and one where the parties have a mutual commitment to a shared life to the exclusion of all others and that the relationship is genuine and continuing. The parties have plans for their future together and see their relationship as long-term.

40. *Conclusion*

41. The Tribunal has considered all the evidence and the circumstances of the parties' relationship both individually and cumulatively. The Tribunal finds the weight of the evidence supports a finding that at the time of application the parties were in a genuine and continuing spousal relationship. Despite their physical separation, the parties' relationship and commitment to one another has grown and they have plans for their future together as a family with their daughter in Australia. The Tribunal finds that at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and are in a genuine and continuing relationship. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made and at the time of this decision.

¹¹ Article 9 of the Convention on the Rights of a Child - www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child - Accessed on 16 January 2023

42. For the reasons above, the Tribunal finds the visa applicant meets the time of application criteria in cl.309.211(2). As the visa applicant continues to meet this criteria at the time of this decision the visa applicant meets cl.309.221(1).
43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

44. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211(2) of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Naomi Schmitz
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).